Supreme Court, U.S.
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No. 87-1319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MEADE ESPOSITO,

Petitioner,

—v.—

THE NEW YORK TIMES COMPANY, NEW YORK NEWS INC. and THE ASSOCIATED PRESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower court properly applied the standards articulated in *Press-Enterprise Co. v. Superior Court*, 487 U.S. 1, 106 S. Ct. 2735 (1986), and *Waller v. Georgia*, 467 U.S. 39 (1984), in ordering the release of redacted versions of pretrial motion papers over defendants' objections based on privacy interests.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

In early July 1987, despite the finding that the materials at issue had been legally obtained by the government, the District Court for the Eastern District of New York (the "District Court") entered two separate orders sealing all documents filed in connection with certain pretrial defense motions to suppress evidence made on behalf of two major political figures.[1] After

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1 The original sealing orders were founded on two interests: (1) that of the *defendants* to a fair trial and (2) that of the privacy of *third parties* who were referred to and discussed in the tapes (A-1); the subsequent orders focused solely on privacy interests (A-14-15; A-21-22). (All references to "A-_____" are to the Appendix to the Petition.)

an expedited appeal by the three respondent news organizations, the Court of Appeals for the Second Circuit, basing its decision on a number of recent Supreme Court precedents recognizing a qualified First Amendment right of public access to judicial proceedings, vacated and remanded. *In re Matter of The New York Times Company*, 828 F.2d 110 (2d Cir. 1987) ("*New York Times I*"). The Second Circuit noted that the

> [o]ther circuits that have addressed this question have construed the constitutional right of access to apply to written documents submitted in connection with judicial proceedings that themselves implicate the right of access. [Citations omitted.] We agree that a qualified First Amendment right of access extends to such documents. Access to written documents filed in connection with pretrial motions is particularly important in the situation presented by Judge Weinstein's July 14, 1987 order, where no hearing is held and the court's ruling is based solely upon the motion papers.

Id. at 114.

Recognizing that the material sought to be sealed had been obtained under Title III[2], which mandates certain restrictions on disclosure of the material so obtained, the Second Circuit carefully parsed through the statutory scheme enacted by Congress. The Court appropriately concluded that Section 2517(3) expressly permitted the disclosure of wiretap information in connection with a judicial proceeding, so that no conflict was even presented between the statutory scheme and the constitutional right of access. *See* 18 U.S.C. § 2517(c); *New York Times I* at 114-116. The court was careful to enunciate the balancing test to be applied:

> We thus agree with appellees that the right of privacy protected by Title III is extremely important. Nevertheless, where a qualified First Amendment right of access exists, it is not enough simply to cite Title III. Obviously, a stat-

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2 P.L. No. 90-351, Title III, 82 Stat. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1986)).

> ute cannot override a constitutional right. . . . Thus, our recognition of a qualified First Amendment right of access to the motion papers filed here does not mean that the papers must automatically be disclosed. The First Amendment right of access to criminal proceedings is not absolute. Proceedings may be closed and, by analogy, documents may be sealed if "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " *Press-Enterprise II*, 106 S. Ct. at 2743, citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510. . . . Where privacy interests in wire-tapped conversations are asserted, the court should consider "whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes." *Waller* [*v. Georgia*], 467 U.S. at 48, 104 S. Ct. at 2216.

Id. at 115-116 (footnote omitted).[3]

The Second Circuit went on to conclude that, while the District Court had appropriately looked at fair trial and Title III privacy interests, its rulings were not specific enough to meet the requirements for limiting access in criminal pretrial matters articulated by this Court in *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II* "), 478 U.S. 1, 106 S. Ct. 2735 (1986) and *Waller v. Georgia* ("*Waller*"), 467 U.S. 39 (1984). The matter was remanded to the District Court for more specific factual findings in accord with the standards enunciated therein. *New York Times I* at 116.

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3 The Government has never opposed Respondents' application to make public the motion papers submitted in connection with the suppression motion. (JA-38.) Noting the Justice Department's policy favoring the "free flow of information to the public," and the "very very narrow set of papers" at issue, revealing only "a narrow set of facts," the Government found an absence of any countervailing factors warranting continued secrecy of the motion. (JA-59-60.) (References to "JA-_____" are references to pages of the Joint Appendix filed in connection with *In re Matter of The New York Times Company*, 828 F.2d 110 (2d Cir. 1987).)

On remand, the District Court held two hearings to determine what, if any, material should be unsealed. After a painstaking review from the bench of each page, word by word, the District Court made numerous redactions in keeping with the mandate of *New York Times I*, and ordered the remaining material released. Petitioner sought a stay, which was granted; the second appeal followed.

However, Petitioner in that appeal failed to explain how the District Court purportedly misapplied the governing standard set forth by the Second Circuit in *New York Times I* or how such continued and complete secrecy was either "essential to preserve higher values" or "narrowly tailored to serve that interest." *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). Thus, the Second Circuit properly rejected, once again, the position that the motion papers in their entirety must remain secret; in a display of great caution and sensitivity to the privacy interests involved, the matter was remanded yet again with instructions that the District Court review one narrow factual issue.

> Appellant's main claim to us is that the district court did not comply with the directions of this court in *New York Times I*. Examination of the record does reveal that Judge Weinstein may have thought that *New York Times I* mandated the disclosure of the sealed material without further redaction, if such further redaction would result in a document that was "almost meaningless." Since we did not intend *New York Times I* to require such a result, we vacate the September 22 order and remand the case to the district court.

In re Matter of The New York Times Company, 834 F.2d 1152, 1154 (2d Cir. 1987) ("*New York Times II*").

In response to this subsequent remand, the District Court on December 16, 1987, spent almost three hours again reviewing the still-sealed material word by word and making specific redactions, supported by on-the-record findings, in conformance with *New York Times I* and *New York Times II*. Petitioner ap-

pealed yet a third time. This time, without hearing argument, the Court of Appeals affirmed.

> Appellant argues that Judge Weinstein's order should be vacated and the matter remanded for a third time because the order violates the privacy interests of appellant, Congressman Biaggi and other third parties. We disagree. Judge Weinstein applied the criteria that we set forth in *New York Times I* and *New York Times II* and we see no persuasive reason for overturning his exercise of discretion.

In re Matter of The New York Times Company, ____ F.2d ____, ____ (2d Cir. January 28, 1988) ("*New York Times III*"). The Petition for a Writ of Certiorari from this Court followed. The materials remain sealed.

SUMMARY OF ARGUMENT

This Court has already decided the standard to be applied when balancing the constitutional right of access to criminal proceedings with an individual's privacy interest in conversations obtained through legal electronic means. *Press-Enterprise II*, 478 U.S. 1, 106 S. Ct. 2735 (1986); *Waller*, 467 U.S. 39 (1984). This same standard uniformly has been held by lower courts to apply to the underlying motion papers as well as to proceedings in open court.

In *New York Times I*, the Second Circuit correctly applied those authorities. Its subsequent decisions properly held that the District Court's triple review of the materials at issue—first in July, again in September and a third time in December—coupled with the physical redaction of myriad names and references to and involving private individuals in their private business, correctly balanced the constitutional right of access with Title III's concerns with privacy. In limiting redaction of the public record to those matters found by the courts to be necessary to preserve discernible rights and to prevent invasion of deeply personal areas of privacy, the rulings below present no

overriding issue of special importance. There is no basis for the granting of the instant Petition.

REASONS FOR DENYING THE WRIT

THE DECISIONS BELOW CORRECTLY APPLIED THE PRECEDENTS OF THIS COURT TO BALANCE THE CONSTITUTIONAL RIGHT OF ACCESS IN CRIMINAL PROCEEDINGS AGAINST ASSERTED PRIVACY INTERESTS

The courts below correctly found that secreting the bulk of legally obtained information in the public record from public discussion, after extensive redactions which recognized legitimate privacy interests, would impermissibly abridge the public's qualified right of access to criminal proceedings. These decisions are in accord with the well-established precedents from this Court and should not be reviewed on this record.

POINT I

THIS COURT HAS ALREADY RESOLVED THE STANDARD GOVERNING PUBLIC ACCESS TO PRETRIAL PROCEEDINGS

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court first recognized an affirmative, constitutionally-protected right of the public and the press to attend criminal proceedings, for "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572 (Burger, C.J.).[4]

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4 The United States Constitution, through the First and Fourteenth Amendments, thus reflects "a common core purpose of assuring freedom of consent on matters relating to the functioning of government." 448 U.S. at 575. It creates "a guaranteed right of the public" to attend criminal trials. *Id.* at 580.

Following *Richmond Newspapers*, this Court consistently and repeatedly has affirmed the constitutional right of access, both to trial and pretrial proceedings. *See Press-Enterprise II*, 478 U.S. 1, 106 S. Ct. 2735 (1986) (right of access to preliminary hearing including exclusionary motions); *Press-Enterprise I*, 464 U.S. 501 (1984) (right of access to jury selection); *Waller v. Georgia*, 467 U.S. 39 (1984) (Sixth Amendment right of access to suppression hearings); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (right of access to testimony of minor in sex crime prosecution).[5]

The legal issue presented here, as Petitioner frames it, is "resolution of the constitutional conflict between the right of privacy and the qualified right of public access to pretrial proceedings." (Pet. at 10-11.) However, Petitioner does not even mention that this Court already has decided just this issue only four years ago.

In *Waller v. Georgia*, despite the Government's attempt to close a hearing involving the admissibility of wire-tapped conversations (on the theory of protecting the privacy interests of those who were not parties to the criminal prosecution), this Court held that the standards set forth in *Richmond Newspapers* and its progeny fully applied to deciding whether a suppression hearing involving electronically-obtained surveillance information could be closed.[6] The Court specifically noted that the constitutional "aims and interests are no less pressing in a hearing to suppress wrongfully seized evidence." 467 U.S. at

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5 The right of access repeatedly has been held to extend to pretrial suppression hearings such as was at issue below. *See In re Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *Associated Press v. Bell*, 70 N.Y.2d 32, 517 N.Y.S.2d 444, 510 N.E.2d 313 (1987).

6 *Waller* addressed the conflict in the context of a defendant's Sixth Amendment challenge to closure of a pretrial suppression hearing, but the Court made clear that the same standards announced in *Richmond Newspapers* and its progeny applied. 467 U.S. at 44-47.

47; *see also Press-Enterprise II*, 478 U.S. at ____, 106 S. Ct. at 2740.[7]

The wiretaps at issue in *Waller* were conducted pursuant to Ga. Code Ann. § 16-11-64 (1982) rather than Title III. However, the Georgia statute requires that wiretaps be kept secret under standards mandated to be at least as protective of privacy as Title III. *See e.g.*, *Evans v. State*, 252 Ga. 312, 314 S.E.2d 421, 425 (1984); *Avers v. State*, 181 Ga. App. 244, 351 S.E.2d 692, 694 (1986); *see also Waller*, 467 U.S. at 41-42 & n.1. In short, this Court's analysis in *Waller* resolved the very conflict presented below: between the public right of access and the protection of legitimate privacy interests.

The decisions below, on the authority of *Waller* and *Press-Enterprise II*, correctly found that this constitutional right extends to written material as equally as to statements in open court. As the Second Circuit recognized, the very concerns that led to recognition of the qualified right of access to judicial proceedings apply fully to criminal motion papers, especially where, as here, "no hearing is held and the court's ruling is based solely upon the motion papers." *New York Times I* at 114. This holding is consistent with the rulings of every other Court of Appeals to have addressed this question. *See In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986); *United States v. Smith*, 776 F.2d 1104, 1111-12 (3d Cir. 1985); *United States v. Rosenthal*, 763 F.2d 1291, 1293-94 (11th Cir. 1985); *Brown and Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165,

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7 The fact that intercepted conversations of political figures are involved here does not militate in favor of a more restrictive rule. "The defendant here [is] a prominent politician who at all times during the suppression hearing retained his public offices and positions of political power. He [is] charged with crimes concerning his conduct as a public official and political leader. . . . It is thus vital that proceedings affecting the prosecution of a public figure such as the defendant be held in open court. . . . This need is emphasized in the case of suppression proceedings. . . ." *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978).

1178-81 (6th Cir. 1983); *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).[8]

In short, the rulings below present no significant legal issue to be resolved by this Court on the record presented.

POINT II

THE ORDERS BELOW ARE CONSISTENT WITH THE STATUTORY DISCLOSURE PROVISIONS OF TITLE III

Petitioner's assertion that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, constitutes an absolute bar to the public access ordered, simply because electronically intercepted communications are involved in the motion to suppress, was correctly rejected below. Title III, which represents the legislative balance between Fourth Amendment privacy interests and the needs of modern law enforcement, provides for the sealing of recorded communications obtained pursuant to authorized surveillance, 18 U.S.C. § 2518(8), but also authorizes disclosures of intercepted communications in proper circumstances. Specifically, Title III provides that:

> Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter *may disclose the contents of that communication or such derivative evidence while giving testimony* under oath or affirmation *in any proceeding* held under the authority of the United States or of any State or political subdivision thereof.

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8 These decisions acknowledge that there is no reasoned basis to distinguish between oral proceedings and written argument and testimony. Public access to each is equally important to promote the informed discussion of governmental affairs, to promote the fairness of judicial proceedings, and to check corrupt practices through public scrutiny. *See, e.g., Associated Press v. United States District Court*, 705 F.2d at 1145.

18 U.S.C. § 2517(3) (emphasis added). This statutory authorization is simple and explicit; it is *not* restricted to testimony demonstrated to be necessary or relevant to the prosecution of a crime, to testimony already ruled admissible at trial, or even to testimony at a trial rather than in a pretrial proceeding. Congress "must have known that most criminal proceedings are conducted in public, so probably they expected . . . that most testimony authorized by Section 2517(3) would end up in the public domain." *United States v. Dorfman*, 690 F.2d 1230, 1233 (7th Cir. 1982).[9]

The Title III material now at issue was submitted under "oath or affirmation" in a proceeding held under the authority of the United States. Its disclosure thus is authorized by the statute. *See United States v. Rosenthal*, 763 F.2d at 1293 (the "privacy interests expressed in Title III have been overborn by the statute itself which has determined that wiretapping is permissible under these circumstances and that disclosure in open court is appropriate.").[10] Especially given the District Court's determination that the evidence at issue was properly and legally obtained (JA-63-64), there is no statutory or other justification for sealing the entirety of the motion papers. *See United States v. Cianfrani*, 573 F.2d at 859.

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9 *Dorfman* and other Title III cases cited in the Petition were decided prior to *Press-Enterprise I*, *Waller* and/or *Press-Enterprise II*. These cases did not apply the standards subsequently established by this Court to balance privacy interests against the public's right of access to criminal pretrial proceedings.

10 Cases such as *National Broadcasting Co. v. United States Department of Justice*, 735 F.2d 51 (2d Cir. 1984) and *United States v. Ferle*, 563 F. Supp. 252 (D.R.I. 1983), interpreting the "good cause" requirement in Section 2518(8), are beside the point. The instant case does not involve independent discovery of Title III information for civil litigation or for its news value, as was at issue in those cases. Indeed, this case does not involve an application under Section 2518 at all. Rather, it simply seeks to enforce the constitutional right of public access to motion papers filed with the court with due regard given to legitimate privacy interests of private citizens.

Indeed, the public interest in knowing the types of electronic surveillance judicially authorized pursuant to Title III is a particularly strong one. Only with this information can the public demand a more privacy-conscious legislative mandate from the Congress or, alternatively, seek to put even more aggressive crime fighting tools in the hands of prosecutors. Such political accountability is at the core of the First Amendment.[11] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 606 (1975) (citations omitted) (public "may rightly demand to know what actions are being taken by law enforcement personnel to bring . . . individuals to justice; . . . dissemination of [information about prosecutorial conduct] may generate crucial debate on the functioning of the criminal justice system . . ."); *see also Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *Stromberg v. California*, 283 U.S. 359, 369 (1931).

In short, the limited access to pretrial motion papers granted by the orders below is both mandated by the Constitution, authorized by Title III and consistent with the binding authority emanating from this Court.

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11 Petitioner's argument that the disclosure permitted by the orders below may chill future criminal defendants from bringing motions to suppress is insufficient to warrant this Court's review. The fact is that criminal defendants must frequently make decisions throughout a proceeding that implicate both fair trial and privacy interests, including most obviously the decision whether a criminal defendant or a particular defense witness should be called to testify. Thus, there is nothing novel or compelling about Petitioner's "chilling" argument. Moreover, Petitioner's concerns are eviscerated by the fact that the governing standard adopted below specifically balances both fair trial and privacy interests against the qualified First Amendment right of public access and permits the trial court to consider the "chilling" effect in its equation. *See New York Times I*, 828 F.2d at 114.

POINT III

THERE IS NO REASON FOR THIS COURT TO REVIEW THE LOWER COURTS' CORRECT APPLICATION OF THE GOVERNING STANDARD TO THE FACTS PRESENTED

The Second Circuit instructed the District Court to analyze the material at issue based, *inter alia*, upon the holding of *Press-Enterprise I*, to the extent that "deeply personal" information could, "under some circumstances, justify a limited closure of pretrial proceedings." 464 U.S. at 511; *New York Times I* at 116.[12] The District Court painstakingly reviewed the materials on three separate occasions and, after applying the balancing test, ordered numerous redactions of names, identifying characteristics and conversations. The Second Circuit upheld the balance. A *de novo* review by this Court is not warranted.[13]

This Court has recognized that privacy interests of "innocent" citizens, while unmistakably important and deserving of attention, are not absolute but instead are to be weighed against the strong First Amendment rights of the public. It is well settled that, in some instances, individual privacy interests will give way in some part to weightier or more general concerns. *See Press-Enterprise I*, 464 U.S. 501 (1984); *Waller*, 467 U.S. 39 (1984); *In re Herald*, 734 F.2d 93 (2d Cir. 1984); *cf. Cable News*

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12 The specific redactions made by the District Court, while never seen by Respondents, are not being challenged in this proceeding.

13 The lower courts' decisions correctly recognized that "[r]emoval of all references to any third party [or wholesale sealing] nullifies the ruling[s] of this court . . ." and would not be countenanced. *United States v. Criden*, 681 F.2d 919, 921 (3d Cir. 1982); *see New York Times I* at 116 (some redaction may be necessary); *see e.g.*, *Press-Enterprise II*, 478 U.S. at _____; 106 S. Ct. at 2743-44; *Press-Enterprise I*, 464 U.S. at 510.

Network, Inc. v. United States, 824 F.2d 1046 (D.C. Cir. 1987).[14]

A generalized concern over privacy is not sufficient to defeat the right of public access to criminal proceedings absent evidence that the information to be disclosed is likely to "inflict unnecessary and intensified pain" on third parties "who the Court reasonably finds are entitled to such protection", a standard not met here. *United States v. Criden*, 681 F.2d 919, 921 (3d Cir. 1982); *cf. Press-Enterprise II*, 478 U.S. at ____, 106 S. Ct. at 2743 (adopting a "substantial probability of prejudice" standard for closure).[15] Thus, there is no reason for this Court to conduct its own factual inquiry for, even after three trips to the Court of Appeals and five hearings before the District Court, the Petition is devoid of any factual showing of "whose privacy interests might be infringed, how they would be infringed, [and] what portions of the tapes might infringe them. . . ." *Waller*, 467 U.S. at 48; *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. at 558.

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14 Petitioner's reliance on the District Court's passing observation, at the second hearing, that release of certain information would be "probably unfair", is unavailing, as the "probably unfair" standard has never been adopted by any court of this country.

15 Indeed, the lower courts here implicitly found that "[v]ery few of the references to third parties, albeit unflattering, and we may assume false, rise to the level of "intensified pain", as distinguished from mere embarrassment, which would warrant deletion. . . ." *United States v. Criden*, 681 F.2d at 922 (denying redaction of *all* references to *all* third parties in trial materials obtained under Title III in "Abscam" case).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

March 4, 1988

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RULE 28.1 CERTIFICATE

Respondent The New York Times Company respectfully advises the Court pursuant to Rule 28.1 of the Rules of this Court that it has no parent company and that it has no affiliates or subsidiaries, other than wholly-owned subsidiaries, which are publicly traded.

Respondent New York News Inc., incorrectly named herein as New York Daily News, Inc., advises the Court that it is a corporation wholly owned by The Tribune Company, a Delaware corporation, and that it has no subsidiaries or affiliates.

Respondent The Associated Press advises the Court that it is a mutual news cooperative organized under the New York Not-For-Profit Corporation Law. The Associated Press is a news wire service whose primary purpose is gathering, editing and transmitting news reports and photographs to its 1,350 member newspapers and its 3,950 member broadcast stations throughout the United States. The Associated Press advises the Court that it has no parent company and that it has no affiliates or subsidiaries other than wholly-owned subsidiaries, which are publicly traded.